Supreme Court, U.S.
FILED
APR 1 1996
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No. 95-1206

In the Supreme Court of the United States

OCTOBER TERM, 1995

CHARLES B. CORCES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

DAVID S. KRIS
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the court of appeals improperly affirmed petitioner's conviction and sentence in an unpublished judgment order that did not specifically address each of his claims of error.

2. Whether the district court violated petitioner's Fifth Amendment rights by admitting evidence that he produced documents in response to a subpoena duces tecum directed to the custodian of records of his corporate law office.

3. Whether the district court erred in departing upward from petitioner's Guidelines sentencing range because of petitioner's "gross abuse" of the judicial system.

4. Whether the court of appeals erred in denying petitioner's motion to unseal transcripts of ex parte district court hearings.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. A1-A2) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1995. A petition for rehearing was denied on November 17, 1995. Pet. App. A27. The petition for a writ of certiorari was filed on January 29, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on one count of conspiring to commit extortion, in violation of 18 U.S.C. 1951 (1988). The jury failed to reach a verdict on three other counts, in which petitioner was charged with conspiring to commit racketeering in violation of 18 U.S.C. 1962(d), racketeering in violation of 18 U.S.C. 1962(c), and attempting to commit extortion in violation of 18 U.S.C. 1951 and 2. Petitioner was sentenced to 121 months' imprisonment, to be followed by two years' supervised release. The court of appeals affirmed. Pet. App. A1-A2.

1. a. Petitioner, an attorney practicing in Tampa, Florida, brokered a bribe between a criminal defendant, Nelson Gonzalez, and a corrupt state prosecutor, John Valenti. Petitioner was Valenti's close friend and had paid him in the past to obtain favorable results in prosecutions. In January 1991, Valenti was prosecuting Gonzalez for murder. Valenti asked petitioner to contact Gonzalez's attorney, Manuel Machin, to suggest the possibility of a bribe in exchange for a favorable plea agreement. Petitioner contacted Machin and told him that Valenti would not agree to a second-degree murder charge "unless you * * * put [$20,000] cash in my hand." Gov't C.A. Br. 5-8.

Machin informed the authorities of petitioner's solicitation and agreed to wear recording equipment during future transactions with petitioner. Recorded conversations between petitioner and Machin, as well as court-authorized electronic wiretaps on petitioner's and Valenti's telephones, revealed numerous

discussions about the bribe request. Petitioner was arrested carrying the bribe money from Machin into his law office. Gov't C.A. Br. 9-15.[1]

b. Before trial, the grand jury investigating the case subpoenaed the records and the custodian of records of petitioner's law office, an entity incorporated under Florida law. See 8/11/92 Tr. 3, 15-17. Petitioner moved to quash the subpoenas or to obtain immunity before complying with them, arguing that enforcement of the subpoenas would violate his Fifth Amendment right against compelled self-incrimination. After a hearing, the district court rejected petitioner's Fifth Amendment claim, explaining that the subpoenas sought corporate, not personal, records. See *id.* at 17. The court also remarked that it had operated on the assumption that the records would be produced by petitioner, and that no one had suggested that any alternate custodian produce the records. *Ibid.* Petitioner subsequently appeared before the grand jury and produced the corporate records. See Gov't C.A. Br. 35-36.

At trial, two grand jurors testified that petitioner had appeared before the grand jury and, as records custodian, had produced and identified the law office's records. Petitioner objected to that testimony on Fifth Amendment grounds. The district court overruled his objection and stated that "[a] substitute custodian could have come in and could have responded to what it was that was made available as the custodian

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[1] Both Valenti (who cooperated with the prosecution) and Machin testified for the government at trial. There was evidence at trial that petitioner had paid Valenti on several other occasions for favorable dispositions in criminal prosecutions. Gov't C.A. Br. 15-17.

in [a] custodial capacity. The Supreme Court cases are clear that that does not constitute self incrimination. * * * [E]xplanation with regard to what has happened to those documents is not a problem." 11/2/93 Tr. 21.

c. During the course of the trial, the court conducted several ex parte conferences with the prosecution, the defense, and witnesses represented by counsel. Those conferences were conducted to resolve issues concerning attorney-client privileges, Fifth Amendment rights, and ongoing investigations into other crimes. The district court maintained transcripts of the ex parte hearings under seal, and did not disclose them to any party that was excluded from the hearing. Thus, the government did not have access to the transcripts of hearings between the court and petitioner, and petitioner did not have access to the transcripts of hearings between the court and the government. See Gov't C.A. Br. 58-59.

d. Petitioner's offense level under the Sentencing Guidelines was 24. See 3/11/94 Tr. 128. The district court departed upward, under Guidelines § 5K2.0, by six levels to a final offense level of 30. The court remarked that "I don't think the guidelines commission has envisioned what I have heard in this case." 3/11/94 Tr. 125. The court explained further (*id.* at 125-126, 128):

> No, I don't think that the guidelines sentencing commission thinks that this is happening every day in every community in this country, because if it is, law and order is on its way out. To even think that there is a perception that prosecutors or Judges, whether it's State or Federal, can be

> bought and paid for in their determinations, does destroy the system.
>
> * * * * *
>
> An upward departure is absolutely demanded in this case. How much? It should be much more than this probably, but I think this is fair. It is fair because it sets what I believe is consistent with the guidelines. If the Judge—if the Federal Judge who accepted the bribe got six years, then I think for what you've done to this system this is fair.

The court reiterated that it found reason to depart from the Guidelines sentencing range because "the facts as found are of the kind not contemplated by the sentencing commission," and it stated that the departure motion was "granted finding gross abuse of the legal and judicial system of the Thirteenth Judicial Circuit, State of Florida." 3/11/94 Tr. 129; see also Pet. App. A14-A15. Petitioner was sentenced to 121 months' imprisonment. Without the departure, his sentencing range would have been 51 to 63 months' imprisonment. *Id.* at A10-A15.

2. On appeal, petitioner contended (among other things) that the district court had erred in allowing the grand jurors to testify about his appearance and production of records before the grand jury, that the court had improperly departed upward from the Guidelines sentencing range, and that the court had erred in refusing to provide him with transcripts of the ex parte hearings held with the government. He also filed a motion in the court of appeals for access to the sealed transcripts. On July 18, 1994, the court of appeals ordered the government to submit the

transcripts of the ex parte hearings conferences between the government and the district court. See Pet. App. A3. On September 12, 1995, the court of appeals affirmed petitioner's conviction and sentence in a judgment order, *id.* at A1-A2, and also denied his motion for access to the seaied transcripts, *id.* at A4.

ARGUMENT

1. Petitioner's central contention (Pet. 22-25) is that the court of appeals erred in affirming his conviction and sentence in a judgment order rather than a written opinion. That contention is without merit. The right to appeal provided a defendant under 28 U.S.C. 1291 entitles him to review of the district court's judgment by the court of appeals. Petitioner received that review. The right to an appeal does not also encompass the right to a written opinion discussing each of the defendant's claims. "There is no requirement in law that a federal appellate court's decision be accompanied by a written opinion," and the "fact that a disposition is by informal summary order rather than by formal published opinion in no way indicates that less than adequate consideration has been given to the claims raised in the appeal." *Furman* v. *United States*, 720 F.2d 263, 264, 265 (2d Cir. 1983) (per curiam); see also *Taylor* v. *McKeithen*, 407 U.S. 191, 194 n.4 (1972) (per curiam) (courts of appeals should "have wide latitude in their decisions of whether or how to write opinions").

United States v. *Rivera*, 994 F.2d 942 (1st Cir. 1993), relied on by petitioner (Pet. 14), is not to the contrary. In that case, the First Circuit, per then-Chief Judge Breyer, observed that, under 18 U.S.C. 3742(f)(2), a court of appeals must state "specific reasons" for its conclusion that a sentence imposed

by the district court is outside the applicable Guidelines range and is unreasonable. See 994 F.2d at 950.[2] The Sentencing Reform Act does not, however, require a court of appeals to give specific reasons for affirming a district court's decision to sentence outside the applicable Guidelines range. See 18 U.S.C. 3742(f)(3) ("If the court of appeals determines that the sentence * * * is not described in paragraph (1) or (2), it shall affirm the sentence.").[3]

2. Petitioner renews (Pet. 17-20) his contention that the district court violated his Fifth Amendment rights when it permitted two grand jurors to testify that he produced the records subpoenaed from his office. That contention is incorrect. The subpoena was directed to petitioner's law office, not petitioner. That office had no Fifth Amendment privilege. Petitioner waived his personal Fifth Amendment act-of-production privilege when he voluntarily produced the documents himself, instead of designating an alternate custodian.

In *Braswell* v. *United States*, 487 U.S. 99, 102 (1988), the Court reaffirmed that corporations and other artificial business entities, no matter how small, "are not protected by the Fifth Amendment."

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[2] Section 3742(f)(2) provides, in pertinent part: "If the court of appeals determines that the sentence * * * is outside the applicable guideline range and is unreasonable[,] * * * it shall state specific reasons for its conclusions[.]"

[3] The petition does not raise the issue presented in *Koon* v. *United States*, No. 94-1664, and *Powell* v. *United States*, No. 94-8842 (both argued Feb. 20, 1996), namely, the standard of review to be applied by a court of appeals in reviewing a district court's decision to depart from the applicable Guidelines range. Accordingly, this case need not be held for *Koon* and *Powell*.

The Court therefore held that "a corporate custodian * * * may not resist a subpoena for corporate records" by invoking his personal privilege against self-incrimination, because such an officer "holds th[e] documents in a representative rather than a personal capacity." *Id.* at 109, 110.

The Court also stated in *Braswell* that, where a custodian of records acts in a representative capacity, the government "may make no evidentiary use of the 'individual act' [of production] against the individual. For example, in a criminal prosecution against the custodian, the Government may not introduce into evidence before the jury the fact that the subpoena was served upon and the corporation's documents were delivered by one particular individual, the custodian." 487 U.S. at 118. At the same time, the Court observed that, in most situations, the production of a corporation's documents by a custodian presents no Fifth Amendment difficulty because, even if the regular custodian might be incriminated by his act of producing the documents, an alternate custodian can be appointed to produce the subpoenaed materials. *Id.* at 116.

In this case, the grand jurors testified that petitioner personally produced the documents called for by the subpoena. 11/2/93 Tr. 33; 11/3/93 Tr. 154. Petitioner was not, however, compelled to produce the corporate documents personally. The subpoenas were directed to the custodian of records of petitioner's law office, not to petitioner as an individual, nor to petitioner (or any other specific person) as custodian. Thus, as the district court explained at trial, "[a] substitute custodian could have come in and could have responded to" the subpoenas. 11/2/93 Tr. 21.

At the hearing on his motion to quash the subpoena, petitioner did not argue that the appointment of a surrogate custodian was infeasible. See 8/11/92 Tr. 17; cf. *Braswell*, 487 U.S. at 116-117. Instead of appointing an alternate custodian, or requesting the court to make such an appointment, petitioner chose to appear before the grand jury himself. His appearance in person was voluntary, and that appearance, accordingly, is fatal to his claim of compelled self-incrimination.

Even if the district court erred in permitting the grand jurors to refer to petitioner personally as the custodian who produced the records, that error was harmless. The only testimonial content of petitioner's production of the documents was his tacit acknowledgment that the documents existed, were within his control, and were those described in the subpoena. See *Fisher* v. *United States*, 425 U.S. 391, 410 (1976). Most of the documents authenticated through evidence of petitioner's production of them concerned petitioner's transactions with Valenti on behalf of other beneficiaries. Those transactions, along with the Gonzalez matter, formed the basis of the racketeering counts. Petitioner was not convicted on those racketeering charges. See Gov't C.A. Br. 2, 5. The jury also heard reference to petitioner's grand jury testimony concerning the Gonzalez file, but that testimony was trivial and ministerial, and neither the file nor petitioner's grand jury testimony about it was discussed in closing arguments. See *id.* at 37.

3. Petitioner argues (Pet. 11-16) that the district court erred in departing upward from his Guidelines sentencing range, and that the court of appeals erred in affirming that departure without "explaining, in

any way, why the factor considered as justifying departure was valid or why the extent of the departure was reasonable." Pet. 11. As we explain above (pp. 6-7, *supra*), the court of appeals was not required to state reasons for its affirmance of the sentence.

The district court explained on the record that the perception that prosecutors can be "bought and paid for in their determinations[] does destroy the system." 3/11/94 Tr. 125-126. It also found an aggravating circumstance—"gross abuse of the legal and judicial system of the Thirteenth Judicial Circuit, State of Florida" (*id.* at 129)—that the Sentencing Commission has expressly stated may justify a departure in an extortion case. See Guidelines § 2C1.1, Application Note 5 (when "the defendant's conduct was part of a systematic or pervasive corruption of a governmental function, process, or office that may cause loss of public confidence in government, an upward departure may be warranted"). The district court explained the extent of the six-level departure by stating that "[i]t should be much more than this probably, but I think this is fair" because it "sets what I believe is consistent with the guidelines." 3/11/94 Tr. 127.

4. Finally, petitioner renews his argument (Pet. 20-22) that he should have been given access to transcripts of the ex parte hearings between the court and the prosecutor. Petitioner does not contend that the district court erred in conducting the ex parte conferences. He argues only that the court erred in refusing to provide him with transcripts of the conferences after the fact. Petitioner contends that the transcripts might support a claim that he was prejudiced by some government conduct at the

hearings, and that without the transcripts he was "unable to intelligently evaluate which issues to raise or not to raise on appeal." Pet. 22. That claim does not merit further review by this Court.

Petitioner relies on decisions holding that trial transcripts must be available to a criminal defendant in pursuing an appeal. See Pet. 21 (citing, *e.g.*, *Griffin* v. *Illinois*, 351 U.S. 12 (1956)). Those decisions, however, do not stand for the proposition that a defendant is entitled to transcripts of ex parte hearings from which he was properly excluded in the first place. Although transcripts of ex parte hearings are "usually" provided, see *In re Paradyne Corp.*, 803 F.2d 604, 612 (11th Cir. 1986) (per curiam), there is no absolute right to such transcripts, given the sensitive nature of the information that may be disclosed at ex parte hearings. See, *e.g.*, *In re Grand Jury Subpoena*, 72 F.3d 271, 276-277 (2d Cir. 1995); *United States* v. *Jean*, 25 F.3d 588, 594 & n.2 (7th Cir. 1994). Moreover, in this case, after petitioner moved to unseal the ex parte transcripts, the court of appeals ordered the government to submit the transcripts for its review; the government and the district court both submitted hearing transcripts. In its appellate brief (at 59), the government also invited the court of appeals to review the transcripts. Ultimately, the court denied petitioner's motion to unseal on the day that it affirmed his conviction and sentence. Thus, it appears that the court of appeals reviewed the transcripts, concluded that the reason for keeping them under seal still existed, and further concluded that nothing prejudicial to petitioner occurred during the hearings. Those factbound determinations do not merit further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

DAVID S. KRIS
Attorney

APRIL 1996